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11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA  
13 SAN JOSE DIVISION

15 WINDSOR AUCTIONS, INC., a Florida  
16 corporation, and JEWELRY AUCTIONS  
17 CORPORATION, a New Jersey corporation,  
18 and UNIVERSAL COLLECTIBLES, LLC, a  
19 Delaware Limited Liability Company,

18 Plaintiffs,

19 v.

20 EBAY INC., a Delaware corporation,

21 Defendant.

Case No. C 07 06454 RMW

**DEFENDANT EBAY INC.'S NOTICE OF  
MOTION AND MOTION TO DISMISS  
PLAINTIFFS' AMENDED COMPLAINT  
PURSUANT TO FED. R. CIV. PROC.  
12(B)(6); MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF**

Date: October 3, 2008

Time: 9:00 a.m.

Dept.: 6

Judge: Hon. Ronald M. Whyte

Amended Complaint Filed: July 24, 2008

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**NOTICE OF MOTION AND MOTION TO DISMISS**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD IN THIS MATTER:

PLEASE TAKE NOTICE that on October 3, 2008 at 9:00 a.m., or as soon thereafter as this motion may be heard, Defendant eBay Inc. will move to dismiss each of Plaintiffs' four claims set forth in the Amended Complaint ("FAC"). This motion is made under Federal Rule of Civil Procedure § 12(b)(6). eBay moves to dismiss with prejudice counts one through four on the following grounds: (1) as a matter of law, Plaintiffs' allegations do not support a claim under California's Unfair Practices Act, Cal. Bus. & Prof. Code § 17045; (2) Plaintiffs' allegations are insufficient to support a claim for common law unfair competition; (3) Plaintiffs' allegations are insufficient to support a claim for breach of the implied covenant of good faith and fair dealing (styled in the FAC as "Count 1" "As to All Plaintiffs"); and (4) Plaintiffs' allegations are insufficient to support a claim for breach of the implied covenant of good faith and fair dealing (styled in the FAC as "Count 2" "As to Plaintiffs Windsor Auctions and JA").

**STATEMENT OF ISSUES TO BE DECIDED**

1. Whether Plaintiffs' allegations support a claim under California's Unfair Practices Act, Cal. Bus. & Prof. Code § 17045.

2. Whether Plaintiffs have alleged facts sufficient to support a claim for common law unfair competition.

3. Whether Plaintiffs have alleged facts sufficient to support a contractual claim for breach of implied covenant of good faith and fair dealing as to all Plaintiffs.

4. Whether Plaintiffs have alleged facts sufficient to support a contractual claim for breach of implied covenant of good faith and fair dealing as to Plaintiffs Windsor Auctions, Inc. and Jewelry Auctions Corp.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

On July 1, 2008, this Court dismissed Plaintiffs' original complaint ("Complaint") on all but one cause of action. Plaintiffs' amended complaint ("FAC"), not only fails to correct any of the defects this Court found in the Complaint, it demonstrates that Plaintiffs' pleading deficiencies cannot be cured. At the heart of Plaintiffs' complaints is a software tool offered by eBay that Plaintiffs' competitor apparently manipulated to his advantage. Although Plaintiffs now admit they always had access to the piece of eBay software and used it in the same way as their competitor, they argue that eBay somehow hid the tool from them.<sup>1</sup> This logical impossibility illustrates why the entire FAC should be dismissed.

Specifically, Plaintiffs' amendments do not cure the defect this Court found in the Unfair Practices Act claim. This Court dismissed the Section 17045 claim because Plaintiffs, who access eBay through a third party, purchased services from eBay on different terms and conditions than Plaintiffs' competitor, who purchased services directly from eBay. The FAC repeats the Section 17045 claim, but once again shows that Windsor and Jewelry Auctions ("JA") purchased services on different terms and conditions. As these Plaintiffs admit, they both signed an agreement with a third party. And at the urging of the third party, not eBay, they chose to be bound by additional terms and conditions beyond those contained in the eBay Agreement. Those additional terms and conditions contained in Plaintiffs' agreement with the third party required Plaintiffs to use the third party's interface regardless of what tools were available through eBay's own interface. Therefore Windsor and JA purchased access to the eBay Live Auctions venue on different terms and conditions than direct eBay customers such as the competitor or Plaintiff Universal.

Plaintiffs' amendments also fail to cure the defect this Court found in their common law unfair competition claim. This Court dismissed the claim because Plaintiffs failed to specify a duty in the Complaint. Despite this Court's clear message to the Plaintiffs that they needed to

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<sup>1</sup> In addition, Plaintiffs admit that widespread use of the tool would generate more revenue for eBay.

1 allege a duty to survive a motion to dismiss, Plaintiffs again failed to include any such allegation.  
 2 Plaintiffs' unfair competition claim must again be dismissed.

3 Similarly, Plaintiffs' amendments to their breach of implied covenant of good faith and  
 4 fair dealing claim run afoul of this Court's warning that the claim would be "substantially  
 5 weakened" if Plaintiffs chose to access eBay through a third party rather than directly. In the  
 6 FAC, Plaintiffs allege that the third party, *not eBay*, told Plaintiffs Windsor and Jewelry Auctions  
 7 that they had to use the third party to access eBay's Live Auction service.

8 Lastly, Plaintiffs raise a new breach of implied covenant of good faith and fair dealing  
 9 claim based on eBay terminating its agreement with Plaintiffs Windsor and JA. But as Plaintiffs  
 10 admit in the FAC, eBay chose to end its contractual relationship by providing thirty days notice as  
 11 expressly authorized by the terms of the parties' Agreement. This termination cannot be the basis  
 12 for a breach of the implied covenant claim.

## 13 II. STATEMENT OF FACTS

14 This Court dismissed Plaintiffs'<sup>2</sup> original Unfair Practices Act (Section 17045) claim and  
 15 its claim for common law unfair competition. Order Granting in Part and Den. in Part Mot. to  
 16 Dismiss, July 1, 2008 (docket item 34) ("Order") at 1.<sup>3</sup> The Court dismissed the Section 17045  
 17 claim because Plaintiffs did not purchase on like terms and conditions as the alleged competitors  
 18 and the common law unfair competition claim because Plaintiffs failed to specify what duty eBay  
 19 owed to them. Order at 7-8. Although this Court denied eBay's motion with respect to Plaintiffs'  
 20 original claim for breach of the implied covenant of good faith and fair dealing, this Court warned  
 21 Plaintiffs that their "claim would be substantially weakened if eBay is able to demonstrate that  
 22 plaintiffs elected to use the interface provided by Live Auctioneers rather than the listing tools  
 23 provided by eBay . . . ." Order at 9.

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24  
 25 <sup>2</sup> A description of the parties Windsor Auctions, Inc. ("Windsor"), Jewelry Auctions Corp.  
 26 ("JA"), and eBay Inc. ("eBay"), as well third parties Live Auctioneers LLC ("Live Auctioneers")  
 27 and George Molayem ("Molayem"), can be found in eBay's motion to dismiss the original  
 28 complaint filed on February 12, 2008 (docket item 10) at pages 2-3. Universal Collectibles, LLC  
 ("Universal") has been added as a Plaintiff. Universal is a direct eBay Live Auctions customer  
 who sells jewelry, coins, art and collectibles. FAC ¶¶ 9 & 17.

<sup>3</sup> Plaintiffs' Robinson-Patman Act claims were dismissed with prejudice.



1 On July 24, 2008, Plaintiffs filed the FAC. In the FAC, Plaintiffs attempt to re-allege  
2 their Section 17045 claim and their common law unfair competition claim. Plaintiffs restated  
3 their breach of the implied covenant claim, and added an additional breach of the implied  
4 covenant claim based on eBay's termination of its agreement with Windsor and JA.

5 As alleged in the FAC, Windsor, JA and Universal signed agreements with eBay for  
6 access to the eBay Live Auctions venue. (FAC ¶¶ 11 & 21) The eBay Live Auction agreement  
7 (the "Agreement") to which each of the parties agreed has been previously provided to the Court  
8 on February 12, 2008, and was sealed by the Court on June 18, 2008. FAC ¶¶ 12 & 14; docket  
9 item 13 (motion to seal); docket item 32 (order sealing Agreement).

10 Although each of the three Plaintiffs admit that they had access to the eBay Live Auctions  
11 venue and sold items in the venue, (FAC ¶¶ 16-17), Plaintiff Universal used eBay's Live Auction  
12 platform as a direct customer of eBay (FAC ¶¶ 9 & 17), whereas Plaintiffs Windsor and JA  
13 contracted with Live Auctioneers for access to the eBay Live Auction platform (FAC ¶ 11).  
14 Plaintiffs Windsor and JA allege that Live Auctioneers informed them "that eBay Live Auctions  
15 was no longer accepting direct clients," and represented that Windsor and JA's relationship with  
16 Live Auctioneers "would be identical to contracting directly with eBay Live Auctions . . . ."  
17 FAC ¶¶ 11 & 13. This appears to be false. The contract between Live Auctioneers and Plaintiffs  
18 Windsor and JA not only contains different terms and conditions than the eBay Agreement,  
19 Windsor and JA agreed under the Live Auctioneers contract that they would not "engage the  
20 services of another entity which provides services similar to those of [Live Auctioneers] to host  
21 auctions on the internet, including but not limited to, eBay or its subsidiaries or affiliates." Live  
22 Auctioneers Agreement<sup>4</sup> at ¶ 4(a).

23  
24 <sup>4</sup> As explained in the declaration of Adam Sand, filed contemporaneously herewith, the form Live  
25 Auctioneers agreement referenced in paragraph 11 of the FAC (the "Live Auctioneers  
26 Agreement") was provided to eBay by Plaintiffs. As fully explained in eBay's request for  
27 judicial notice filed contemporaneously herewith, the terms of the Live Auctioneer Agreement are  
28 appropriate for consideration on motion to dismiss because the agreement is referenced in  
Plaintiffs' FAC. FAC ¶ 11. Because of the confidential nature of the Live Auctioneers  
Agreement, a true and correct copy will be lodged with the Court under seal pending the Court's  
granting of the Administrative Motion to File Under Seal pursuant to Civ. L.R. 79-5 filed  
herewith.

1 Plaintiffs state that in 2006 they noticed that a competitor, Molayem, a direct user of the  
 2 eBay Live Auction platform, was experiencing a “substantial increase in” sales. FAC ¶¶ 19-20.  
 3 Plaintiffs allege that upon asking Molyaem about his success, Molayem told them he manipulated  
 4 “a live auction end time duration change function tool contained in eBay Live Auctions’ Catalog  
 5 Management Set-Up Page (the ‘End Time Duration Tool’),” and that this manipulation allowed  
 6 him to upload auction lots in a way that supposedly allowed him to more prominently list his  
 7 auction lots for sale on the eBay platform. FAC ¶ 24.

8 In the original Complaint, Plaintiffs claimed the alleged tool was not available to them.  
 9 *See e.g.*, Complaint ¶¶ 14, 18, 22, 28 and 33. But they now admit that it was always available to  
 10 them and that they accessed and used the tool in the same way as Molayem. FAC ¶ 32. Despite  
 11 this admission, Plaintiffs claim that “eBay purposely hid the End Time Duration Tool from all the  
 12 Plaintiffs by not acknowledging its existence when asked and thereby making it unavailable to the  
 13 Plaintiffs.” FAC ¶ 25. Plaintiffs fail to provide any facts to support this claim or even that eBay  
 14 had knowledge of Molayem’s manipulation. Indeed, Plaintiffs allege that use of the tool was  
 15 “lucrative for eBay” (FAC ¶ 27) and that widespred use of the tool would “generate[] more  
 16 revenue for eBay than do sales by live auction sellers who did not use the” tool (FAC ¶ 41).<sup>5</sup>

17 Plaintiffs Windsor and JA allege that eBay notified them on March 5, 2008 that eBay was  
 18 terminating their user IDs. FAC ¶33. Section 18(b) of the Agreement states “[e]ither party may  
 19 cancel this agreement for any reason, or no reason whatsoever, upon thirty (30) days written  
 20 notice to the other.” Agreement § 18(b). Plaintiffs admit that eBay “shut down” Windsor and  
 21 JA’s user IDs on April 9, 2008, a little over thirty days after the March 5, 2008 notice. FAC ¶ 35.

### 22 **III. LEGAL STANDARDS ON RULE 12(B)(6) MOTION TO DISMISS**

23 This Court may dismiss a claim when “there is no cognizable legal theory or an absence  
 24 of sufficient facts alleged to support a cognizable legal theory.” *Navarro v. Block*, 250 F.3d 729,  
 25 732 (9th Cir. 2001). In deciding a motion under Rule 12(b)(6), “all material allegations of the  
 26 complaint are accepted as true, as well as all reasonable inferences to be drawn from them.” *Id.*

27 <sup>5</sup> This admission is especially inconsistent with their theories since one Plaintiff, Universal, is a  
 28 direct customer of eBay just as Molayem.



1 However, as the Supreme Court recently emphasized, “labels and conclusions, and a formulaic  
 2 recitation of the elements of a cause of action will not” survive a motion to dismiss. *Bell Atl.*  
 3 *Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). *Accord Nat’l Ass’n for Advancement of*  
 4 *Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1049 (9th Cir. 2000). A claim should  
 5 be dismissed if a statutory cause of action does not apply to the defendant’s conduct as a matter of  
 6 law. *See, e.g., Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1485-86 (9th Cir. 1995)  
 7 (dismissal of plaintiff’s statutory claim warranted where plaintiff’s allegations are insufficient to  
 8 bring defendant within the parameters of that statute).

#### 9 IV. ARGUMENT

##### 10 A. As a matter of law, California’s Unfair Practices Act, Cal. Bus. & Prof. Code 11 § 17045, does not apply to Plaintiffs’ allegations.

12 In their first cause of action, Plaintiffs claim that eBay violated Section 17045 of  
 13 California’s Unfair Practices Act. California’s Unfair Practices Act provides, in relevant part:

14 The secret payment or allowance of rebates, refunds, commissions,  
 15 or unearned discounts, whether in the form of money or otherwise,  
 16 or secretly extending to certain purchasers *special services or*  
 17 *privileges not extended to all purchasers purchasing upon like*  
*terms and conditions*, to the injury of a competitor and where such  
 payment or allowance tends to destroy competition, is unlawful.

18 Cal. Bus. & Prof. Code § 17045 (emphasis added). Plaintiffs’ allege that eBay extended a  
 19 “special privilege” to Molayem that was not extended to them. FAC ¶ 38. But Plaintiffs now  
 20 admit they had access to and used the alleged tool at issue in this case. FAC ¶ 32. Plaintiffs’  
 21 Section 17045 “special privileges” claim requires that the alleged special services or privileges  
 22 were *secretly* extended to certain purchasers with whom Plaintiffs were purchasing on *like terms*  
 23 *and conditions*. *Eddins v. Redstone*, 134 Cal. App. 4th 290, 332-33 (2005). Plaintiffs have  
 24 alleged neither.

##### 25 1. eBay did not secretly extended special services or privileges.

26 Plaintiffs allege that Molayem “manipulated” a tool in the eBay Live Auctions’ Catalog  
 27 Management Set-Up Page which they refer to as the “End Time Duration Tool.” FAC ¶ 24.  
 28 Plaintiffs do not allege that eBay secretly provided this tool only to Molayem, showed him how to

1 use it, or forbid others from using the tool. Plaintiffs merely claim that Molayem's manipulation  
 2 of the tool was with "eBay's knowledge and acquiescence," (FAC ¶ 24) and that eBay "hid the  
 3 End Time Duration Tool from all Plaintiffs by not acknowledging its existence" (FAC ¶ 25).  
 4 Plaintiffs now admit that they always had access to the tool and even used the tool just as  
 5 Molayem.<sup>6</sup> FAC ¶ 32.

6 Plaintiffs fail to explain how eBay knew Molayem was manipulating the tool. Indeed,  
 7 they admit they had to learn how to manipulate the tool from Molayem, not eBay. FAC ¶ 24.

8 Moreover, Plaintiffs' allegations demonstrate that eBay had no incentive to hide the  
 9 alleged tool. Plaintiffs allege that use of the tool "generated more revenue for eBay than do sales  
 10 by live auction sellers who did not use the End Time Duration Tool." FAC ¶ 41. Taking this as  
 11 true leads to the logical conclusion that eBay would benefit more if all users manipulated the tool  
 12 in the same way. *See e.g.*, FAC ¶ 27 (alleging that Universal's use of the tool "would have  
 13 substantially increased Plaintiff Universal's sales and profits using the eBay Live Auction  
 14 platform.")). This would be true regardless of whether the users were direct customers, such as  
 15 Molayem or Plaintiff Universal, or whether they accessed eBay Live Auctions through a third  
 16 party, as Plaintiffs Windsor and JA. *See* FAC ¶ 14 (explaining that eBay earns a commission  
 17 from its Live Auctions customers' sales, regardless of whether the customers use a third party for  
 18 access to the venue).

## 19 **2. Plaintiffs did not purchase on like terms and conditions.**

20 The underlying facts that caused this Court to dismiss Plaintiffs' previous Section 17045  
 21 claim remain the same—Plaintiffs Windsor and JA admittedly purchased services on different  
 22 terms and conditions than Molayem. Order at 7-8. Instead of using the eBay Live Auctions  
 23 platform directly as Molayem and Plaintiff Universal, they chose to use an independent third  
 24 party, Live Auctioneers, to access the eBay Live Auctions platform. FAC ¶¶ 11 & 20. There is  
 25 no doubt that direct eBay clients, like Molayem and Plaintiff Universal, purchased access under  
 26 one set of terms and conditions, while indirect eBay clients, like Plaintiffs Windsor and JA

27 \_\_\_\_\_  
 28 <sup>6</sup> These admissions contradict their original allegations that the tool was unavailable to them. *See*  
*e.g.*, Complaint ¶ 14.

1 purchased access with the additional terms and conditions required by Live Auctioneers.

2 Through its contract with Plaintiffs Windsor and JA, Live Auctioneers prohibited Windsor  
3 and JA from using eBay's services directly. Live Auctioneers Agreement ¶ 4(a). By contracting  
4 with Live Auctioneers, Plaintiffs Windsor and JA agreed to access the eBay Live Auctions venue  
5 using only the services and tools provided by Live Auctioneers, regardless of whether those  
6 services and tools differed from what was available to those who used eBay Live Auctions  
7 directly. Therefore, by using the Live Auctioneers interface, Plaintiffs Windsor and JA's access  
8 to the eBay Live Auctions venue was subject to the limitations of Live Auctioneers' terms and  
9 conditions—and thereby a different set of terms and conditions—than the terms and conditions  
10 governing eBay's direct customers.

11 Plaintiffs further allege that Windsor and JA had no choice but to use Live Auctioneers.  
12 But Plaintiffs do not allege that *eBay* forced Windsor and JA to use Live Auctioneers to access  
13 the eBay Live Auctions venue, or that *eBay* represented that using Live Auctioneers would be  
14 equivalent to contracting with eBay. Plaintiffs allege that *Live Auctioneers* made those  
15 representations. FAC ¶ 11. By Plaintiffs' own admissions, eBay did not force them to accept  
16 different terms and conditions and their Section 17045 claim fails. *Eddins v. Redstone*, 134 Cal.  
17 App. 4th 290, 332-33 (2005).

18 **B. Plaintiffs' fail to allege a duty to support a claim for common law unfair**  
19 **competition.**

20 This Court found that Plaintiffs failed to state a claim for common law unfair competition.  
21 Order at 8. The Court understood Plaintiffs' common law unfair competition claim to be based  
22 on negligent interference with economic relations. *Id.* Assuming Plaintiffs again have attempted  
23 to plead a claim for negligent interference with economic relations with their common law unfair  
24 competition claim, Plaintiffs must first demonstrate that eBay owed Plaintiffs a duty of care. 5  
25 Witkin, Summary 10th (2005) Torts § 751, p. 1086; Order at 8. Just as in Plaintiffs' original  
26 Complaint, Plaintiffs fail to specify what duty eBay owed to the Plaintiffs.<sup>7</sup> Therefore, Plaintiffs

27 <sup>7</sup> Comparing Plaintiffs' common law unfair competition allegations in the FAC to the Complaint  
28 reveals that Plaintiffs' amended allegations are nearly identical to their original allegations, with  
only nominal changes to the phrasing of each of the four paragraphs. Compare Complaint ¶¶ 26-

again fail to state a claim for common law unfair competition and the cause of the action must be dismissed.

**C. Plaintiffs have not stated a valid claim for breach of the implied covenant of good faith and fair dealing.**

To state a claim for breach of the implied covenant of good faith and fair dealing, Plaintiffs must show that eBay failed or refused to discharge its contractual responsibilities “by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement.” *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1395 (1990). The implied covenant of good faith only protects “the parties’ right to receive the benefit of their agreement.” *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 699 n.39 (1988). In applying the covenant of good faith, a contract’s “implied terms should never be read to vary express terms.” *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 374 (1992). *See also, Foley*, 47 Cal. 3d at 690 (“The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract’s purposes.”).

The FAC contains two counts of breach of the implied covenant of good faith and fair dealing. Plaintiffs’ first count, which pertains to all Plaintiffs, fails because it seeks to impose extra-contractual duties on eBay and because eBay provided Plaintiffs with the full benefits of the contract. Plaintiffs’ second count, which pertains only to Windsor and JA, fails because it seeks to prohibit eBay from doing what the Agreement expressly permits—terminating the Agreement with thirty days notice. As a result, Plaintiffs have failed to state a claim on either count for the breach of the implied covenant of good faith and fair dealing claims and each must be dismissed.

**1. eBay fulfilled its contractual covenants.**

Plaintiffs contend that they each entered into a written agreement with eBay, pursuant to which eBay would provide a venue for all three Plaintiffs to conduct on-line live auction events. FAC ¶ 48. And Plaintiffs admit that eBay performed under this contract and provided Plaintiffs

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29 with FAC ¶¶ 43-46.

1 with access to the venue where each of the Plaintiffs conducted on-line live auction events. FAC  
 2 ¶¶ 16-17 & 48. Now Plaintiffs seek to impose extra-contractual duties upon eBay by claiming  
 3 that eBay provided “the End Time Duration Tool to Molayem but not to Plaintiffs, who  
 4 contracted for like-kind services with eBay.” FAC ¶ 50. As explained above, however, Plaintiffs  
 5 now admit that they had access to the alleged tool, and therefore they cannot use this as the basis  
 6 of their claim.

7 Plaintiffs claim they asked eBay for an end time duration tool and that eBay did not tell  
 8 them about Molayem’s manipulation of the Catalog Manager software. FAC ¶¶ 24-25 & 50. But  
 9 Plaintiffs have not alleged—and cannot—that the relevant contract required eBay to disclose how  
 10 one eBay customer manipulated an alleged “End Time Duration Tool.”<sup>8</sup> In fact, such an  
 11 allegation would be inconsistent with the terms of the Agreement. The Agreement contains an  
 12 “entire agreement” provision, which forecloses Plaintiffs from alleging such an extra-contractual  
 13 duty. Agreement at ¶ 19(g). The express terms of the Agreement only require eBay to provide  
 14 Plaintiffs access to its venue for conducting on-line live auction events.<sup>9</sup> Agreement at ¶ 2.  
 15 Plaintiffs have alleged no facts to support a conclusion that eBay failed to fulfill this contractual  
 16 covenant.

17 **2. eBay terminated Plaintiffs in accordance with the express terms of the**  
 18 **Agreement.**

19 Plaintiffs further allege that eBay breached the implied covenant of good faith and fair  
 20 dealing by terminating Windsor and JA’s user IDs. FAC ¶¶ 54-59. However, the covenant of  
 21 good faith may not “be read to prohibit a party from doing that which is expressly permitted by an  
 22 agreement.” *Carma Developers*, 2 Cal. 4th at 374 (1992) (finding termination of a contract was  
 23 not a breach of the covenant of good faith where the contract contained a provision allowing for  
 24 termination). The Agreement expressly allows either party the right to terminate with 30 days  
 25 notice. Agreement ¶ 18(b) (“Either party may cancel this Agreement for any reason, or no reason

26 <sup>8</sup> Indeed, they fail to provide any facts to support their allegation that eBay knew of Molayem’s  
 manipulation of the tool.

27 <sup>9</sup> The contract also contains a “no warranty” provision which explains that eBay does not warrant  
 28 that its services will meet Plaintiffs’ requirements or that the operation of eBay’s services will be  
 error free. Agreement at ¶ 13.



1 whatsoever, upon thirty (30) days written notice to the other.”). Further, Plaintiffs admit eBay  
 2 gave notice of its intent to terminate the Agreement on March 5, 2008 (FAC ¶ 33) and terminated  
 3 the Agreement on April 9, 2008 (FAC ¶ 35), just over thirty days later. Thus, when eBay  
 4 exercised its right to cancel the Agreement in accordance with its express terms, there was no  
 5 breach of the implied covenant of good faith.

6 **D. Leave to amend should be denied since amendment would be futile.**

7 Plaintiffs should not be given leave to amend the claims again. Dismissal without leave to  
 8 amend is appropriate when the court is satisfied that the complaint’s deficiencies cannot be cured  
 9 by amendment. *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003). As demonstrated above,  
 10 Plaintiffs’ deficiencies cannot be cured by another amendment.

11 **V. CONCLUSION**

12 For all of these reasons, Defendant eBay Inc. respectfully requests that this Court dismiss  
 13 each of Plaintiffs’ causes of action.

14 **REQUEST FOR JURY TRIAL**

15 Pursuant to Fed. R. Civ. P. 38(b) and Civil L.R. 3-6, eBay hereby requests a jury trial as to  
 16 all the issues to which it is so entitled.

17  
 18 Dated: August 11, 2008

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